In the

# Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-453

EASTEX, INCORPORATED,

*Petitioner,*

*v.*

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

*Brief Amicus Curiae In Support of Petition On Writ of Certiorari to the United States Court of Appeals For The Fifth Circuit*

## BRIEF ON BEHALF OF CHAMBER OF COMMERCE OF THE UNITED STATES AS AMICUS CURIAE

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# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## CASES





## CASES

## CASES



## STATUTES





## LEGISLATIVE MATERIAL

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## BRIEF ON BEHALF OF CHAMBER OF COMMERCE OF THE UNITED STATES AS AMICUS CURIAE

## INTRODUCTION

This brief on behalf of the Chamber of Commerce of the United States, as *amicus curiae,* is filed pursuant to written consent of the parties under Rule 42(2). It is in support of the petitioner, Eastex, Incorporated.

## INTEREST OF THE AMICUS CURIAE

The Chamber of Commerce of the United States of America is a federation consisting of over 3,700 state and local chambers of commerce and trade and professional associations, and has a direct business membership in excess of 65,000. It is the largest association of business and professional organizations in the United States.

The Chamber regularly represents its member-employers in important labor relations matters vitally affecting their interests before the courts, the United States Congress, the Executive Branch and independent regulatory agencies of the federal government. Such representation constitutes a significant aspect of the Chamber's activities. Accordingly, the Chamber has sought to advance those interests in a wide spectrum of labor relations litigation.[1]

This case presents issues that are of overwhelming importance to the business community, to employers and employees, to this Nation's basic political institutions, and to the rights of private property ownership. Large and small employers throughout this Nation will be affected by the Court's decision in this case.

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[1] See, e.g. *Buffalo Forge Co. v. United Steelworkers of America*, 428 U.S. 397 (1976); *Connell Construction Co. v. Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616 (1975); *Gateway Coal Co. v. United Mine Workers of America*, 414 U.S. 368 (1974); *William E. Arnold Co. v. Carpenters District Council of Jacksonville*, 417 U.S. 12 (1974); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115 (1974); *NLRB v. Bell Aerospace Co. Division of Textron, Inc.*, 416 U.S. 267 (1974); *Boys Markets v. Retail Clerks Union*, 398 U.S. 235 (1970); *NLRB v. Granite State Joint Board*, 409 U.S. 213 (1972); *NLRB v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971); *Booster Lodge No. 405, International Association of Machinists v. NLRB*, 412 U.S. 81 (1973).



This amicus brief is divided into two parts. The first part discusses the practical implications and burdens that would be placed on employers and their private property if the decision below is permitted to stand. The second part will present the legal arguments supporting reversal of the court below.

## SUMMARY OF ARGUMENT

Section 7 of the National Labor Relations Act, as amended,[2] creates *employee rights,* not union rights. Employees are guaranteed the right to organize, join unions, bargain collectively and engage in concerted activities *for the purpose of* collective bargaining or other mutual aid and protection. The Fifth Circuit concluded that Section 7 also protected the distribution *on private property* of political materials prepared by the union urging opposition to a state right-to-work law and support of federal minimum wage legislation.

In so concluding, the Fifth Circuit has created new Section 7 rights, unwarranted by legislative history, unsupported by case authority and resulting in serious practical consequences.

The legislative history of Section 7 reveals a congressional concern addressed exclusively to an individual's status as an employee — that is, the employee's relationship *vis-a-vis* his employer. The Fifth Circuit's analysis of the political literature in question here demonstrates that this material sought to advance interests of the union involved and of organized labor generally. Because of the nature of the political literature here — and because it admittedly addressed issues beyond the employer-employee relationship —

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[2] 61 Stat. 136, 73 Stat. 519, 29 U.S.C. §151 et seq.

this case cannot turn on the narrow question of whether the persons who sought to perform the actual distribution were employees of the particular employer.

The Fifth Circuit found that the literature itself was protected by Section 7, and then concluded that its distribution on private property was equally protected. That holding not only expands Section 7 beyond the intent of its drafters, it writes new law unsupported by other authority.

The distribution of political (though labor related) material is not an activity protected by Section 7. Even if such activity might fall within the "broad umbrella" of Section 7, it is so clearly on the periphery that this Court should hold as a matter of law that the compelling constitutional consideration of private property interests outweighs the arguable Section 7 right.

If the Fifth Circuit's decision is allowed to stand, it will have a practical impact well beyond its facts, and raise far more questions than it answers. Amicus would urge that this precedent would at the very least: (1) place no effective limitation on the subject matter or volume of political materials which could be distributed on an employer's property; (2) furnish no restriction as to what interest group might choose to utilize this new avenue of communication; (3) subject an employer's property to competing propaganda from differing points of view; (4) thrust on an Administrative Law Judge the responsibility to censor political literature — and then only in the context of an unfair labor practice hearing alleging that an employer has violated federal law; (5) open the law of collective bargaining to possibly newly created mandatory subjects of bargaining; and (6) subject a private employer to possible criminal sanctions for lending assistance to political advertising, while at the same time effectively barring any response.



The Fifth Circuit misread the legislative history and case law development of Section 7, and it failed to consider the enormous potential impact of its decision in other areas. Its decision should be reversed.

## I.

## PRACTICAL IMPLICATIONS OF THE DECISION BELOW

### A. Introduction.

The essential issue in this case is unique in the annals of this Nation's political and labor history. As the court below stated, "[W]e are, in the Astronautical Age, exploring new space, with only limited or hierarchical limitations imposed."[8]

This Court's decision will determine the fundamental rights of employers throughout the country to maintain their private business premises free from virtual unlimited use by others — for political and other purposes unrelated to the employer's direct relationship *vis-a-vis* its employees. More precisely, the question is whether an employer such as Eastex shall be forced to permit unions, their representatives, members, non-union employees, and others acting with them, to use its private business property for the purpose of the distribution of politically oriented materials. Stated another way, the issue is whether an employer will be

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[8] *Eastex, Inc. v. NLRB*, 550 F.2d 198, 199 (5th Cir., 1977).

required, by virtue of newly expanded Section 7 rights, to support the dissemination of political propaganda on its private property.

The literature at issue here was political, addressed to political issues of general concern to organized labor. It was not in response to any act or statement by Eastex. The court below characterized this material as concerning a "highly charged emotional issue", and one which generated "controversy".[4] Amicus suggests that extension of Section 7 protection to distribution of such materials on private property is not only without support in the statutory language or case authority, it is also contrary to constitutional precepts and common sense.

**B. The Predictable Impact.**

Amicus invites the Court to consider questions which would inexorably arise if this "wedge" is permitted to open the door to a new roomful of yet undiscovered Section 7 rights. Amicus believes that the following discussion illustrates the very real legal, political and economic concerns which employers throughout the Nation feel as they await the outcome of this case.

1. **The subject matter and the volume of political materials which could be legally distributed on employer's property under the Fifth Circuit's "reasonably related" test is virtually unlimited.**

The court below, in adopting that test, relied heavily on the decision of the Ninth Circuit in *Kaiser Engineers v. NLRB*.[5] The

[4] 550 F.2d at 205.

[5] 538 F.2d 1379, 1384 (9th Cir. 1976).



obvious threshhold question presented is how to delineate the bounds of matters "reasonably related" to jobs, or of "legitimate concern" to employees. Posing the question itself illustrates the practical impossibility of limiting political material which might fall within the definition.

Virtually everything which affects the lifestyle of employees and their families may be argued to be of legitimate interest. For example, thousands of statutes, regulations and ordinances are proposed by various officials on federal, state and local levels each year — and probably most have some arguable impact on jobs or at least concern matters of "legitimate concern" or "reasonably related" job interest. Accordingly, most could be argued to be within this newly declared Section 7 protection. Thus, political propaganda supporting or opposing such legislation, and other similar political issues, could presumably be distributed freely on an employer's private property.

There is no conceptual difference between a statute affecting jobs or employment, and a candidate who urges such statute's passage, or an incumbent politician who might oppose it. Thus, literature specifically urging the support or opposition of candidates would be subject to unhampered distribution on an employer's private property, beyond the control or oversight of the employer.

Money is the lifeblood of politics. A union authorized by the Fifth Circuit's proposed test to support general political issues, and candidates with whom the union might agree or disagree would be entitled to solicit contributions for the benefit of that candidate on the employer's private property.

The Fifth Circuit's proposed test would place no limit on the *volume* of material which might be freely distributed. Dozens of leaflets — or even entire newspapers — could fall within the "reasonably related" test, and thus acquire an immunity from employer intervention.

The point here is simple: No great ingenuity would be required to design and write political propaganda for virtually any issue or any candidate which stressed issues affecting jobs or impact on employment of legitimate concern to organized labor. If the Fifth Circuit's test is approved, this Court will have furnished guidelines to the writers of political material, showing them how to design material which may be freely distributed on employers' property.

**2. The Fifth Circuit's holding would open the door to virtually any interest group wishing to promote its favorite political cause on an employer's private property.**

The specific issues in the instant case — distribution of literature opposing right-to-work legislation, and supporting minimum wage legislation — are admittedly beyond the scope of the relationship of the employer *vis-a-vis* his employee. As discussed above, the political issues addressed by the literature here affect only the relationship of the employee to his union, and the union to the general public. In other words, the material sought to be distributed did not affect the standing of employees *qua* employees — but rather addressed matters of general political concern. Accordingly, whether a person who would seek to distribute political literature is an employee or non-employee is without relevance within the context of this case.



The facts here demonstrate this to be so. The political literature came from the union president and his executive council. There can be no conceptual difference between the distribution of union-originated general political material, whether it be by employee or non-employee. Even if this proposed "right" were limited to employees, all a union — or anyone else — need do is recruit an employee as a vehicle for distribution of its political views.

**3. The Fifth Circuit's test could convert an employer's private property into a battleground where different political points of view urged by different parties might compete for time and space, unhampered by the point of view of any employer.**

The interests of organized labor are not monolithic. The interests of individual employees are no more so. To illustrate, consider the example of the right-to-work legislation addressed by one of the paragraphs in the literature being considered here.

Obviously various persons will have different positions on this issue. Does each such person have the right under the Fifth Circuit's test to utilize the employer's private property as his forum? Non-union employees might argue in favor of such legislation because they oppose unions in general. Dissident union-member employees might argue for such legislation because of their opposition to the incumbent union's policies or conduct. Union elected officials might wish to take somewhat different positions or remain silent on the issues, saving their political persuasion for other battles. Other union-member employees might

strongly support repeal of such legislation. Within any of these groups, certain individuals may dissent from the consensus.

Under the Fifth Circuit's test, every point of view, and every dissent, would now be entitled to equal hearing on the employer's private property, even if an employee must be obtained as a vehicle for gaining access.

**4. Under the Fifth Circuit's proposed test, the only possible review of political propaganda distributed on employer's private property would be by an NLRB Administrative Law Judge, after extensive litigation, subjecting the employer to the possibility of having committed an unfair labor practice.**

Under the Fifth Circuit's test, distribution of political material on the employer's property has been approved — subject only to the vague limitation that such material be "reasonably related" to the employees' jobs. The only manner in which this limitation could be invoked by the employer would be for him to prohibit the distribution, thus subjecting himself to a charge of violation of Section 8(a)(1) of the Act — precisely what happened to Eastex in the instant case.

After the expense and delay of investigation of the charge and assignment of an Administrative Law Judge to hear the case, that randomly assigned Law Judge would find himself in a unique position in American jurisprudence. He would be the *de facto* censor to determine — many months after the incident — whether political propaganda generated by the union should be granted his "Section 7 imprimatur" as he applied his understanding of the Fifth Circuit's guidelines in determining whether such propaganda might be "reasonably related" to jobs.



The proposed labor reform legislation, now pending in the United States Senate, is not without significance to this case.[6] An employer guilty of unfair labor practices would be subject to "debarment" — or the cancellation of his government contracts — a result which could spell economic disaster. Awareness of such sanctions would certainly make any government contractor reluctant to challenge the subject matter of political material being distributed — and thus broaden the scope of union activity in this new area.

**5. The decision of the Fifth Circuit adversely affects the collective bargaining process and labor relations.**

If compulsory distribution of politically oriented and polemical materials is to be permitted as a new Section 7 right, then it follows that unions and employee groups can make demands at the bargaining table concerning such distributions and use of company property. If such topics are deemed mandatory subjects of bargaining, the employer — if he chooses not to capitulate to the union's demands — bargains at his peril and faces the specter of unfair labor practice findings and the serious consequences which would follow.

**6. Pursuant to recent federal and state legislation governing corporate employers' contributions to and participation in political activity, a corporate employer would stand virtually gagged, deprived of any effective right to urge his own point of view with regard to political opinions expressed on his own property.**

Quite incongruously, if a corporate employer were to attempt to refute, correct, clarify or comment on political materials alleged

[6] S. 2467, 95th Cong., 2nd Sess. (1978). See also H.R. 8410, 95th Cong., 1st Sess. (1977).

to be of employee job-related interest, or on subjects under legislative consideration, that employer would face possible dire consequences. Both the Federal[7] and the State of Texas[8] statutes relating to political campaigns, elections and legislative matters make it unlawful for a corporate employer to engage in conduct which constitutes a grant "of anything of value", or "any services" "directly or indirectly", for the purpose of influencing the nomination or election of any individual, or (Texas statute only) "aiding or defeating the approval of any measure submitted to a vote of the people of this *state or any subdivision thereof*" (Emphasis

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[7] 2 U.S.C. §431 *et seq.*
Title 2, The Congress, §431, "Definitions", (f) defines "expenditure":
"(f) 'expenditure'
(1) means . . . *anything* of *value* . . . made for the purpose of *influencing the nomination for election, or election, of any person to Federal office*..." (Emphasis added).

[8] The Texas Election Code, Article 14.01, V.A.T.S., Definitions, provides:
"(R) *'Political advertising'* is defined as anything in favor of or in opposition to any candidate . . . or . . . to any measure submitted to a vote of the people, which is communicated in any of the following forms:
• • • •
"(2) *any handbill, pamphlet, circular, flier,* commercial billboard, sign, bumper sticker, or similar printed material." (Emphasis added).
Article 14.06(C) provides:
"(C) As used in this section, the phrase *'contribution or expenditure'* shall also include . . . *other thing of value, directly or indirectly,* to any candidate or political committee . . . or any other person, for the *purpose of aiding or defeating the nomination or election of any candidate or of aiding or defeating the approval of any measure submitted to a vote of the people of this state or any subdivision thereof* . . ." (Emphasis added).
Article 14.06(A) outlaws corporate "contributions," and Article 14.06(E) and (F) provide that violations shall constitute "a felony of the third degree" (for which the sanction "shall be" confinement for two to ten years plus a fine of up to $5,000, Texas Penal Code, Section 12.34).



added). Thus, the employer would stand muted, or invite serious consequences if he attempted to intervene.

The practical implications of the Fifth Circuit's decision are monumental. International unions, local unions, non-union groups and political groups composed in part by employees or acting through them, could utilize an employer's private property to launch direct attacks on any of this Nation's labor laws, executive orders, regulations or directives which they did not like, or endorse those which they approve. The circular in the instant case involved the urging of political action on the right-to-work issue and the veto of minimum wage legislation, and complained of profiteering by the oil industry. But the result apparently would have been the same if the material had urged political action and votes on a wide range of other political subjects which could be said to be reasonably related to jobs or of legitimate interest to the employees. In this legislative battleground, the following might fall: labor reform legislation, public work programs, equal pay, hiring the handicapped, veterans preference, union racketeering or featherbedding, union reporting and disclosure requirements, equal employment opportunity, compulsory age retirement, common situs picketing, age discrimination, pension legislation, social security, pension benefits, various kinds of taxes, child care for workers, workmen's compensation, health care, school tuition, federal or state holidays, occupational health and safety, aliens, farmers, the miners' strike, retirement, traffic congestion and road conditions, full employment legislation, public construction related to municipal bond elections, unemployment compensation, foreign trade and foreign imports, product boycotts, embargoes, adequate law enforcement and protection to and from the work-

place, the equal rights amendment, pay increases for state and local employees, or the foreign operations of multinational corporations — and *candidates who have taken a position* on any such issues.

Unions presently spend many millions of dollars each year on various projects within the framework of our political institutions. Millions are spent for alleged "voter education" programs, by such organizations as the AFL-CIO's Committee on Political Education. It is a way of political life for unions to help finance political candidates in a number of assorted ways. Literally thousands of legislative bills are introduced each year at the various levels of Federal and State government, and unions are known for their ingenuity in finding ways to effectively make their views known and in helping to elect their preferred candidates. It is common knowledge that thousands of political candidates across the country are assisted in myriads of ways by unions and their members each year. Can it seriously be doubted that politicians and political groups could not find ways to work with unions and employees to campaign within employers' plants across the country?

If the decision below is permitted to stand, for the first time in our history unions and other groups with employee participation will be able to demand that political materials of their choice — materials that they have prepared and paid for — be distributed inside the employer's private place of business, against his will.

What a financial and political boon this would be for unions, employee groups, politicians, the many different political and



activist groups, and the political positions they support! They could effectively blanket thousands, even millions, of captive employees at comparatively little expense, with materials of their choice — materials that could not be edited or responded to by the employer regardless of content. As matters of political interest which were "reasonably related" or of "legitimate concern" proliferated — and the number of political candidates and the issues likewise proliferated — employers could expect large quantities, quite possibly avalanches of political materials to flood their business premises. Obviously, such distributions would be greatly distracting, if not disruptive, thereby adversely affecting employee productivity.

If unions acting through employees have this newly created "political pipeline" into an employer's place of business, then presumably the Democratic Party, the Republican Party, the American Socialist Party, the American Communist Party, the American Nazi Party and other political groups have the same right.

In *Lloyd Corporation v. Tanner*,[9] this Court, rejecting First Amendment arguments, denied a political activist group the right to use private property for the distribution of anti-Vietnam circulars. Here, the Fifth Circuit, creating a new Section 7 right, would permit the employer's private property to be used for admittedly political purposes. The apparent differences in the two cases are that in *Lloyd*, the political activists did not include any employees, and their circular related to the Vietnam conflict. Here, the union would use employees as the vehicle to distribute their message; and, obviously, it would be a simple matter to include activist handouts as subject matter which would arguably

[9] 407 U.S. 567 (1972).

fall within the Fifth Circuit's vague, and almost boundless, test of "reasonable relatedness." Thus, if the decision below is permitted to stand, then it appears that the Court will have come "full circle" from *Lloyd,* meaning that unions and different political groups will have the right to use the employer's property to distribute their polemics.

## II.

## QUESTIONS RELATED TO THE EMPLOYEES' ALLEGED SECTION 7 RIGHTS TO DISTRIBUTE POLITICAL AND POLEMICAL MATERIALS ON THE PETITIONER'S PRIVATE PROPERTY

### A. First Amendment Considerations.

No First Amendment Constitutional issues regarding freedom of expression are raised by this case. Although the Fifth Circuit below initially (550 F.2d at 203) made reference to First Amendment considerations, it correctly deleted those references in response to Eastex' petition for rehearing and rehearing *en banc.*[10]

In *Central Hardware Co. v. NLRB,*[11] this Court, in rejecting the contention that the providing of public parking lots by the owner of a retail store subjected that owner to First Amendment restraints, observed:

> "Before an owner of private property can be subjected to the commands of the First and Fourteenth Amendments, the privately owned property must assume to some significant degree the functional attributes of public property devoted to public use. The First and Fourteenth Amendments are limitations on state action, not on action by the owner of private property used only for private purposes."

[10] 556 F.2d 1280, 1281 (5th Cir. 1977).

[11] 407 U.S. 539, 547 (1972).



The same result was reached by this Court in *Hudgens v. NLRB*[12] (involving the right of employees to engage in economic picketing on private property not owned by the employer). As in *Hudgens,* resolution of the issues presented by this case depend solely on the Court's interpretation of Section 7 of the Act.

### B. Employees vs. Non-Employees

The Board's decision suggests that *only the rights of employees* are involved here. This is not true, for here the union published the material and was the movant to have it distributed for its own purposes. The Board in opposition to *certiorari,* did not urge the Court to extend the Fifth Circuit's newly-discovered Section 7 rights to any persons other than employees, but that is the result of the decision below. Indeed all that is required is that non-employee groups have the assistance of two or more employees.

This Court has long considered the distinction between employees and non-employees to be of substance in cases involving other rights asserted under Section 7. In *NLRB v. Babcock & Wilcox Co.,*[13] this Court placed much greater restrictions on non-employee union organizers than were placed on employee

[12] 424 U.S. 507 (1976).

[13] 351 U.S. 105 (1956).

union organizers.[14] However, that distinction was considered to be "one of substance" (351 U.S. at 113) *only* in the context of a union organizational campaign, an activity that falls squarely within the heart of Section 7. This Court left no doubt that its concern for organizational activity was central to its decision in *Babcock*.[15]

The distinction between employee and non-employee rights loses its "substance" in the context of the rights being urged here. The asserted right to distribute general (though labor related) political propaganda is admittedly not a matter involving *any direct relationship between the employee and his employer.*[16] As the court below observed, the materials here reflected the general goals of the union and the interests of organized labor, as distinguished from the specific desires of employees *vis-a-vis* their employer.

Here, the decision and request to distribute the materials in question were made by union president Boyd Young with the concurrence of the union executive board.[17] Thus, it was clearly

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[14] See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

[15] See *Central Hardware Co., supra.*

[16] The Fifth Circuit described the publication as "neutral to Eastex" — thus, clearly showing that the issue of interest to the union or the employee was wholly unrelated to the employer. The court observed of the challenged political literature that "it was done out of direct, tangible employee-union self interest" — which defines a relationship from which the employer is necessarily excluded. With regard to the literature involving the right-to-work laws, the court observed that the subject matter was one "on which organized labor . . . has a . . . direct interest . . ." (550 F.2d at 204).

[17] Findings of the Administrative Law Judge, 215 NLRB 272-273.



the intent of the union officials to use employees as mere vehicles for the distribution of their political literature, for the furtherance of the generalized goals of the union and organized labor. Accordingly, the "substantive" distinction made in *Babcock* between employees and non-employees (recognized by *Central Hardware* to be limited to organizational activities) should be of no significance in this case.

### C. The Distribution of Political and Polemical Material on Private Property Is *Not* a Statutory Right Under Section 7 of the Act.

Section 7 includes a well-defined group of employee rights. Examination of the clear language of Section 7 and its legislative history indicates that Congress intended only to protect employee rights that arise in the context of the direct employer-employee relationship.[18] The Board and the courts have analyzed and defined these rights in numerous cases providing guidelines which distinguish between protected and unprotected employee activities.

The individual's *status as an employee* gives him the right to self-organization, to join or assist a labor organization, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid and protection — or to refrain from all of these activities.[19] These rights are not to be viewed in

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[18] See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1936) wherein Chief Justice Hughes acknowledged that the statute is limited in its purposes and "goes no further than to safeguard" the rights enumerated in Section 7. See also, *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 255 (1938) and *NLRB v. Sands Mfg. Co.*, 306 U.S. 332 (1939).

[19] See *Republic Aviation Corp., supra.*, which placed the emphasis of the Act on collective bargaining.

isolation, but are rather "part of a reticulated legislative scheme with interlacing purposes."[20]

Section 7 does not protect literature. It gives employees rights and protects some of their *activities*. Although the court below recognized briefly the difference between on-premise and off-premise activities ("[T]he scope of Section 7 rights . . . when exercised off the employer's property . . . (is) doubtless limited only by valid general law of the situs and the First Amendment"[21] that court focused its analysis on the literature itself. Once the court concluded that the literature was protected, it leaped to the correlary conclusion that its distribution on private property was similarly protected. In doing so, the court addressed only half the question. Its analysis ignored the unique issue in this case — the interference with the employer's private property rights.

In reaching its decision, the court observed that "we have never been faced with quite this problem before."[22] This observation is simply a recognition that neither the Board nor any other court has ever before believed that Section 7 rights extended to the kinds of activities involved in this case. Then the court proceeded to create broad new Section 7 rights unknown for more than 40 years of the Act's existence.

Legislative history, case authority and important practical considerations all weigh against the court's extension of Section 7

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[20] *NLRB v. Insurance Agent's International*, 361 U.S. 477, 510 (1960).

[21] 550 F.2d at 202.

[22] 550 F.2d at 199.



protection to the distribution of political literature on private property. The Congress, in drafting Section 7, addressed its concern only to matters directly involving the employer-employee relationship. The cases relied on by the Fifth Circuit in reaching its conclusion are noteworthy only in that they lack the controlling element of importance here — namely, distribution of political literature on private property.

Nothing in the legislative history even remotely suggests that Congress intended to give a union, its members, or non-union employees or others acting with them, the right to distribute these kinds of material on an employer's private property. In-depth study of the legislative history of Section 7 reveals that Congress clearly intended to limit these rights to conduct directly or immediately involving the employer-employee relationship — to permit employees to engage in union organizational activities free from employer interference, to encourage collective bargaining and to protect concerted activities insofar as their wages and terms and conditions of employment were concerned.

Senator Wagner, author of the bill, summed up the intent of the bill in stating:

> "The whole philosophy of this legislation is to deal with the relationship between employees and employers." 79 *Cong. Rec.* 7670.

This viewpoint was also expressed by members of the conference committee.[23] Senator Walsh, a major force on the conference

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[23] 79 *Cong. Rec.* 7650.

committee, was instrumental in developing the course of the legislative history in his efforts to assure passage of the bill. He specifically detailed the outer limits of Section 7 during debate over that aspect of the bill, stating:

> "The bill does provide the means and manner in which employees may approach their employers to discuss grievances and permit the Board to ascertain and certify the persons or organization favored by a majority of the employees to represent them in collective bargaining, when the question of that representation is in doubt or dispute. *Beyond this the bill does not go.*" 79 *Cong. Rec.* 7659. (Emphasis added.)

The legislative history clearly reveals that Congress intended that there be limits to Section 7 rights. The legislative history glaringly omits any discussion or the slightest reference to the right of unions and employees to distribute politically-oriented material on the employer's private property. Indeed, there is nothing in the legislative history to suggest that any member of Congress ever thought that the statute would permit these kinds of intrusions into the domain of private property rights.

Similarly, the Fifth Circuit's conclusion finds no support from other courts. Under the guise of the "other mutual aid or protection" language of Section 7, the court below concluded that the literature in question was "reasonably related to the employees' jobs or to their status or condition as employees in the plant," (550 F.2d at 203). This conclusion clearly runs counter to numerous decisions rendered by this Court and several circuits.

The Fifth Circuit's broad "reasonably related" rule opens a virtually unlimited Pandora's box of protected activities, notwithstanding rulings by this Court and several circuit courts that have recognized that Section 7 does not protect all concerted activities.[24] Significantly the Board itself previously recognized that there are limitations on Section 7 rights where distributions of literature on an employer's premises are concerned. In its decision herein[25] the Board reaffirmed its decision in *McDonnell Douglas Corporation*,[26] wherein it held that:



> "... any case which concerns an employer's restraint of employees' efforts to distribute literature upon their employer's plant premises, the first question we must answer is whether the distribution is pertinent to a matter which is encompassed by Section 7 of the Act."

The restrictions of Section 7 have been well articulated by several circuits. In *NLRB v. Bretz Fuel Co.*,[27] which involved the protest of a legislative proposal by miners, the Fourth Circuit found the activity to be outside the ambit of Section 7 protection. There employees opposing proposed "Fire Boss" legislation (which would permit company foremen to perform inspections rather than the designated safety inspector) engaged in a work stoppage and picketing. That court, in finding the activity unprotected, established the following standard:

> "... concerted activity is protected only where such activity is *intimately connected with the employee's immediate employment.*" 210 F. 2d at 396. (Emphasis added).

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[24] *NLRB v. Washington Aluminum Company, 370 U.S. 9 (1962); NLRB v. Leslie Metal Arts Company*, 509 F.2d 811 (6th Cir. 1975); and *Joanna Cotton Mills Co. v. NLRB*, 176 F.2d 749 (4th Cir. 1949).

[25] 214 NLRB at 274.

[26] 210 NLRB 280 (1974).

[27] 210 F.2d 392 (4th Cir. 1954).

That court's standard of "intimately connected" is substantially different and more appropriate than the Fifth Circuit's "reasonably related" guideline and more rationally consistent with the purposes of the Act.

The Ninth Circuit, in *Shelly & Anderson Furniture Mfg. Co. v. NLRB,*[28] expanded its concept of the required employer-employee relationship established in its earlier decision in *Bretz Fuel, supra.* That court, finding that a protest over dilatory bargaining tactics was protected activity, listed the four elements it deemed necessary as the predicate for such finding:

> "(1) there must be a work-related complaint or grievance;
>
> (2) the concerted activity must further some group interest;
>
> (3) a specific remedy or result must be sought through such activity;
>
> (4) the activity should not be unlawful or otherwise improper." 497 F.2d at 1202-1203.

Obviously, the union's publication here would not meet this test.

The Sixth Circuit discussed the scope of Section 7 protection in *Leslie Metal Arts, supra.* There the court found that three suspended employees had engaged in protected activity when they protested the company's failure to maintain discipline which resulted in a hazard to employee safety. In examining the issue, the court found that the protected activity

[28] 497 F.2d 1200 (9th Cir. 1974).



must in some fashion directly involve employees' relations with *their* employer. This requirement of a *specific* employer-employee relationship was clearly emphasized in the court's finding that:

> "When employee activity is directed at circumstances other than conditions of employment, it is outside the protection of Section 7." 509 F.2d at 813.

Clearly, the distribution of political or polemical material is "directed at circumstances other than conditions of employment." The Sixth Circuit, continuing to discuss the scope of Section 7, cited *G. & W. Electric Speciality Company v. NLRB*[29] to demonstrate how broad the spectrum of concerted activities might be, and pointed to that court's conclusion that the potential area of concerted activity was much broader than the coverage of Section 7:

> "The range of possible employee mutual interests apart from those which bear a reasonably significant impact upon working conditions or some material incident of the employment relationship is in our opinion *a much broader field than Section 7 is designed to encompass.*" 360 F.2d at 877. (Emphasis added).

In *G & W Electric,* the Seventh Circuit condemned the Board's attempt to expand the coverage of Section 7 to include "indirectly-related" concerted activity which bears a "reasonable connection" to interests of employees. There the Board had found that an employee's activity against an employee credit union was "within the general reach of the 'mutual aid and

[29] 360 F.2d 873 (7th Cir. 1966).

protection' clause." The court rejected this attempted expansion stating:

> "The sweep of the broad interpretation inherent in the Board's application of the 'or other mutual aid or protection' clause to the facts of the instant case gives to that clause a meaning and effect which in our opinion is out of harmony with the immediate context in which the clause appears and which *transcends the subject matter the Act is designed to embrace — labor management relations.*" 360 F.2d at 876-877. (Emphasis added).

The court further noted that the employees involved in the dispute had status as borrowers or depositors-investors, not status as *company employees.* It was because of this status that the court found that the activity had no "significant connection to their employment relationship with the company."[30] By analogy, it is submitted that any employees of Eastex who might have had an interest in distributing the political literature for the union had the status of interested citizens or agents of the union, but *not* as employees of Eastex, and were, therefore, outside the protection of Section 7.

As indicated, the court below recognized that the issue presented here is novel. Extensive research confirms its statement. No cases have been found wherein this Court, any other court, or the Board at any earlier time has found — or even suggested — that unions, their members, non-union employees and others who may act with them, have the right under Section 7 to distribute on an employer's private property political or other polemical materials, which do not involve matters directly or

[30] 360 F.2d at 876.



immediately within the "employer *vis-a-vis* his employees"[31] relationship.

This Court succinctly summarized the limited nature of communication rights in its decision in *NLRB v. United States Steelworkers of America.*[32]

> "The Taft-Hartley Act does not command that labor organizations as a matter of abstract law, under all circumstances, be protected in the use of *every* possible means of reaching the minds of individual workers...." (Emphasis added.)

In reaching its conclusions herein, the Fifth Circuit relied on authority easily distinguishable from the instant case. The primary decision it relied on was *Fort Wayne Corrugated Paper Co. v. NLRB,*[33] which involved the discharge of an employee allegedly because of his organizational activities involving another employer. The private property rights of neither employer were involved. The court there concluded that an employer could not discharge an employee for union organizational activity even when the activity involved another employer. Significantly the Seventh Circuit's decision was rendered in the context of organizational activity, an obvious Section 7 core right which had absolutely no involvement with private property rights. Subsequently, the Seventh Circuit, in *G & W Electric,* set forth its "employer control" rule discussed *supra,* which accurately depicts that court's view of the "employer *vis-a-vis* his employees" test.

[31] This court has often referred to this phrase as the "touchstone of labor relations." *National Woodwork Manufacturers Assn. v. NLRB,* 386 U.S. 612, 645, (1967); *Cf. Columbia River Packers Assn. v. Hinton,* 315 U.S. 143 (1942).

[32] 357 U.S. 357, 364 (1958).

[33] 111 F.2d 869 (7th Cir. 1940).

Thus, the broad view the court below attributes to the Seventh Circuit is errant.

The court below also cited other cases it considered in accord with *Fort Wayne Corrugated,* dealing with such issues as a refusal to bargain,[34] a discharge related to the newspaper publication of a strike resolution,[35] and the right to have a union representative present during an investigative interview.[36] However, the highly significant and distinguishing feature of each of these cases is that like *Fort Wayne Corrugated,* none of these cases involved the private property rights of the employer. The rights of the employees to engage in politically oriented activities *off* the employer's premises is not the issue in this case, but this is, at most, the only proposition for which the court below cited supporting case law.

**D. Should the Court Find that the Distribution of Materials in Issue Fall Within the Scope of Section 7, the Conflict of Rights Should Be Resolved in Favor of Eastex's Private Property Rights Because of Constitutional Considerations.**

Here the alleged right to invade the employer's private property can at best be argued to be only incidental to Section 7 within the "penumbra" of employees' Section 7 rights. Even if this Court should conclude that Section 7 encompasses such right, it does

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[34] *Bethlehem Shipbuilding Corp. v. NLRB,* 114 F.2d 930 (1st Cir. 1940), which cited *Fort Wayne Corrugated* on that issue only.

[35] *Peter Cailler Kohler Swiss Chocolates Co. v. NLRB,* 130 F.2d 503 (2d Cir. 1942).

[36] *NLRB v. Weingarten, Inc.,* 420 U.S. 251 (1975).



not necessarily follow that unions, their members, and non-union employees, and others acting in concert with them can force an employer to yield his private property for such purposes.

The circumstances of this case make it clear that if any such peripheral Section 7 right exists, it necessarily must give way to the more pervasive constitutional right of due process — one's basic right not to cede his private property against his will for use by others. To rule otherwise would result, as discussed *supra,* in the complete entanglement of private property rights in the honeycombs of political activities of virtually unlimited varieties. Private property rights are a basic tenet of our Constitution. The founding fathers sought to zealously guard private property rights, and this Court, in an endless string of decisions, has steadfastly preserved those rights.

Indeed, this Court's teaching in *Hudgens, supra,* is informative. The issue there was the right of employees to picket their employer in a privately owned, enclosed shopping mall. In discussing the accommodation of Section 7 rights and private property rights, the Court stated:

> "What is a *proper* accommodation in any situation may largely depend upon the *content* and *context* of Section 7 rights being asserted." 424 U.S. at 521 (Emphasis added).

In *Hudgens,* the Court noted the "conspicuous contrast" between the task of the Board and courts in accommodating these rights and the duty of a court to apply First Amendment standards. As the Court pointed out, the guidelines for performing this task were enunciated in *Babcock & Wilcox Co., supra,* and later

echoed in *Central Hardware, supra,* where the Court stated that the accommodation of these conflicting rights:

> "... must be obtained with as little destruction of one as is consistent with the maintenance of the other." 351 U.S. at 112.

The Court recognized that the location of the accommodation:

> "... may fall at different points along the spectrum depending on the *nature* and *strength* of the respective Section 7 rights and private property rights asserted in any given context." 424 U.S. at 422. (Emphasis added).

Here the Section 7 right essentially would protect political expression. Other courts dealing with political matters have concluded that a right of a political nature is subordinate to private property rights. In *Lloyd Corporation, supra,* this Court found that allowing handbilling of a political nature (draft and Vietnam War protests) would be "an unwarranted infringement of property rights."[37] The Court found that the private mall had not been dedicated to public use so as to entitle the exercise of First Amendment rights. Here there is no suggestion that Eastex has been dedicated to public use.

As discussed above, in *Bretz Fuel, supra,* the Fourth Circuit evaluated the "nature" of employee picketing over proposed legislation and found that where the acts of employees are considered to be political activity, there is no protection afforded by the Act.[38] In illustrating this principle, that court referred to

[37] 407 U.S. at 567.

[38] 210 F.2d at 397.



two other circuit court decisions[39] which involved a dispute over wages due under the Fair Labor Standards Act (29 U.S.C.A. § 201, *et seq.),* where employee activity was found to be protected. By analogy, the court stated:

> "But we think it equally clear that if these same employees had gone on strike to put pressure on Congress to pass a favorable change in the Fair Labor Standards Act, that would be *political activity and not protected by the Act,* which was designed to protect employees' rights more *intimately connected with their immediate employment."* 210 F.2d at 397 (Emphasis added).

The facts there are strikingly similar to the facts here. The purpose of the union's publication in Eastex was primarily to protest the right-to-work law, the presidential veto of the minimum wage law and profiteering in the oil industry. This, of course, is unmistakably political activity, and thus would be unprotected under this ruling by the Fourth Circuit.

If the Court concludes that such distribution is possibly within the realm of Section 7 rights, then it is suggested that the Court develop standards to govern the possible exercise of such right. Accordingly, it is suggested that the Court consider standards which would require (a) a direct employer *vis-a-vis* his employees relationship; (b) the four elements detailed by the Ninth Circuit in *Shelly & Anderson, supra,* (a work-related complaint, a group interest of the employees furthered by their concerted activity, a specific remedy

[39] *NLRB v. Moss Planing Mill Co.,* 206 F.2d 557 (4th Cir. 1953); and *Salt River Valley Water Users' Ass'n v. NLRB,* 206 F.2d 325 (9th Cir. 1953).

sought and activity which is not unlawful or otherwise improper); (c) the ability of the employer to control or effectuate change in the subject matter; and (d) consideration of whether alternate means of effective communication exist. The adoption of standards by the Court would be of enormous help in future cases, and would undoubtedly reduce, to some extent, the flood of cases that would otherwise result.

Amicus submits that the conflict here — between constitutionally required protection of the private property rights and the arguably remote Section 7 rights alleged — should be resolved in favor of the former as a matter of law.



## III.

## CONCLUSION

For the foregoing reasons, the decision of the court below should be reversed.

Respectfully submitted,

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